BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Court Below.

There are two opinions of the Minnesota Supreme Court in the present case. The first, filed April 14, 1944 and reproduced at R. 498, et seq., affirmed the order of the trial Court denying the motion of petitioner made in the alternative for judgment notwithstanding the verdict or new trial. This opinion (not yet officially reported) may be found in 14 N. W. (2d) 410. An opinion denying application for reargument was filed May 19, 1944. The second opinion was filed on June 23, 1944, affirmed the judgment of the trial Court entered pursuant to the first opinion of the Minnesota Supreme Court "for the reasons set out in the opinions (*Bimberg* v. *N. P. Railway Co.*, —— Minn. ——, 14 N. W. (2d) 410)". The second opinion is not yet officially reported and has not been included in the Northwestern Reporter to date.

II.

Jurisdiction.

The judgment to be reviewed was filed in the Supreme Court of Minnesota on July 18, 1944 (R. 522).

The jurisdiction of this Court is invoked pursuant to Section 237 of the Judicial Code of the United States as amended by the Act of February 13, 1925, Chapter 229, Sec. 1, 43 Stat. 937 (Sec. 344, 28 U. S. C. A. 205).

Cases believed to sustain the jurisdiction of this Court are:

C., M. & St. P. Ry. Co. v. *Coogan*, 271 U. S. 472, 70 L. Ed. 1041;

M. St. P. & S. S. M. Ry. Co. v. *Moquin,* 283 U. S. 520, 75 L. Ed. 1243;
C. G. W. R. R. Co. v. *Rambo,* 289 U. S. 99, 80 L. Ed. 1066.

III.

Statement of the Case.

A summary statement of the matters involved herein are already included in the petition for writ of certiorari but in order that the Court may have the statement of facts before it in considering this brief, we again outline them as they appear in the petition.

On October 1, 1941, a bridge crew consisting of a straw boss and four carpenters, including the decedent, all in the employ of the petitioner, proceeded to Iron River, Wisconsin, for the purpose of lining track on a wood trestle bridge which crossed a ravine at that point. The bridge was about 300 feet long and, at the point from which decedent fell, about 40 feet above the level of the ground. Long wooden pilings extended up from the ground on the top of which rested cap timbers placed crosswise. The cap timbers supported wooden stringers extending lengthwise of the bridge, and on the stringers rested the ties, some of which were 10 feet and some of which were 12 feet long. On top of the ties and immediately over the wooden stringers were placed the steel running rails of the track. Every fourth tie was bolted to the stringers upon which it rested. By removing the spikes from the ties that were bolted, the top deck of the bridge, consisting of the running rails, the guard rails, and the ties, could be removed a fraction of an inch at a time by the use of steel lining bars. These steel lining bars were about 4½ feet long, weighed about 28 pounds, and were shaped at one end like a chisel with a flat sharp edge about 1½ inches wide. In the work of lining the track these lining bars were placed under the rails at an

angle, resting upon the stringers under the rails. There were two men at each rail and upon a signal from one of them all four men would heave in unison thereby wedging the track in whatever direction it was necessary that it be moved.

The wood trestle bridge carried a single continuous track. Inside this track were placed two steel guard rails designed to prevent trains from leaving the bridge in case of derailment. Near the outer edge on each side of the bridge and running lengthwise of the bridge, was a 6 by 8 wood stringer called a guard timber, so notched as to fit between the ties and prevent their bunching or spreading.

The ties at the east end of the bridge were 12 feet long but on the section of the bridge on which the crew was working at the time of the accident, they were 10 feet long. The ties were placed on 14 inch centers leaving an open space of from 6 to 7 inches between each tie.

The track across the bridge having been reported to be ½ inch out of line, the crew, of which decedent was a member, was dispatched to Iron River to take the "kink" out of the track. First in order of work was the removal of the spikes from each of the bolted ties, that is every fourth tie. This was done for a distance of about 3 rail lengths from the east end of the bridge. The removal of these spikes permitted the deck of the bridge to be wedged either to the north or south as required. On the day in question the wedging was toward the south. Seeford Swanson, in charge at the time, stood at the east end of the bridge sighting along the rails, while the other four men, each equipped with a lining bar, took positions in a form of a square at the point east to the center of the bridge, two men at each rail. The decedent and John Anderson had their lining bars under the south rail while Floyd Kuru and Myron Johnson had their lining bars under the north rail.

Having inserted their lining bars under the rail the four men, at an appropriate signal given by Anderson, heaved simultaneously on their bars, three or four such operations resulting in wedging the deck of the bridge toward the south about ¼ of an inch. On the next operation the decedent's bar apparently slipped, he lost his footing and pitched over the south edge of the bridge to the ground below, thereby sustaining injuries from which he died on October 3, 1941.

The day was clear and the top deck of the bridge was dry. There was nothing broken or in disrepair on the bridge and no claim is made that the lining bars were defective or unfit for their intended purposes.

Liability of the petitioner was predicated upon (1) its alleged failure to furnish decedent with a safe place to work; (2) its alleged failure to provide safeguards, such as a guardrail, plank walk, fence, or safety belt, against the danger of workmen falling off the bridge; (3) its alleged failure to instruct fellow employees as to the proper manner of doing their work; and (4) alleged negligence of such fellow employees. Only the first two charges of negligence were considered by the Supreme Court of the State of Minnesota.

IV.

Specification of Errors Intended to Be Urged.

1. Error in ignoring the decision of *Hanson* v. *Great Northern Railway Co.*, 128 Minn. 122, 150 N. W. 380, 242 U. S. 615, 61 L. Ed. 529; and basing its decision upon *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 87 L. Ed. 1444.

2. Error in holding that construction of wood trestle bridges presents a jury question even though there is no dispute as to general custom and practice with regard to construction thereof.

3. Error in holding that it was negligence not to furnish bridge and building carpenters working on top deck of

wood trestle bridge with either temporary or permanent guardrails, longer ties with closer spacing, or safety belts, without proof that these would have prevented accident or were in general use elsewhere on other railroads.

4. Error in ignoring the fact that respondent did not prove actionable negligence against petitioner under Federal Employers' Liability Act.

V.

Argument.

This Court has jurisdiction.

Respondent in her complaint pleads interstate commerce and a violation of the Federal Employers' Liability Act. It is admitted that the parties were engaged in interstate commerce and the Supreme Court of Minnesota bases its decision upon a violation of the Federal Employers' Liability Act.

This Court in its decisions has said:

> "The Supreme Court of the United States will, on reviewing the judgment of a State Court in an action under the Federal Employers' Liability Act, examine the record and determine for itself whether as a matter of law there is enough to sustain a finding of negligence." *C., M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 70 L. Ed. 1041; *C. G. W. R. R. Co.* v. *Rambo*, 289 U. S. 99, 80 L. Ed. 1066.

1. Error in ignoring the decision of Hanson v. *Great Northern Railway Co., 128 Minn. 122, 150 N. W. 380, 242 U. S. 615, 61 L. ed. 529; and basing its decision upon Bailey* v. *Central Vermont Ry. Inc., 319 U. S. 350, 87 L. ed. 1444.*

In the case of *Hanson* v. *Great Northern Railway Co.*, 128 Minn. 122, 150 N. W. 380, affirmed 242 U. S. 615, 37 S. Ct. 211, 61 L. Ed. 529, it appeared that plaintiff, an experi-

enced bridge and building man, was directed to chip away rock at the head of the lower bridge chords, on the east parapet of the defendant's bridge over Red Lake River at Crookston, Minnesota. The place in which plaintiff was required to do this work was a triangular shaped area on the easterly side of the south end of the bridge. The triangular area was 4 feet in length, approximately 2 feet wide at the north end, and it tapered down to a few inches at the south end. The stone floor of the space was 13 feet above the frozen river below. While plaintiff was working in this rather cramped area his foot slipped, he lost his balance, and fell to the ice below. The negligence charged was that defendant failed to furnish plaintiff a safe place in which to work; that defendant should have constructed a wooden platform upon which plaintiff could stand. Plaintiff submitted no evidence to show that this work was done in a different manner on any other railroad in the locality, or that there was a better or more approved manner in which to carry on that type of work. In denying plaintiff a recovery the Supreme Court of Minnesota said:

> "The place was dangerous in no different way than is any place so high above solid earth that a false step or loss of balance may mean death or serious injury. It was plainly much less dangerous than many places where men are working every day. The master's duty as to furnishing a safe place is only to use reasonable care, and what is reasonable care depends much upon the particular circumstances. To hold that defendant was guilty of a breach of duty to its servants, because it did not floor over this triangular place in which men were occasionally required to stand while working, would be carrying the safe-place doctrine too far. We would next be asked to say that a contractor for the construction of a modern skyscraper must build platforms for the men who are fitting steel joints and girders high above the ground, or that a window washing concern must furnish its men scaffolding to use when

doing their work. The danger in this case was inherent in the nature of the work, and we are not able to perceive how defendant could have removed or lessened this danger by any precaution it could take."

It appears from the facts stated in the case of *Bailey* v. *Central Vermont Railway, Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, that Bailey had been working for defendant some five years as a section man. He and other members of his crew were required to unload a car filled with cinders, which car had been spotted on a bridge, the deck of which was 18 feet above the ground. When the car was occupying the bridge, the available footing on the side of the car was only 12 inches, part of which space was taken up by a raised stringer. There was no guard rail along the side of the bridge. To unload the car of cinders, it was necessary for Bailey to climb along the side of the car and rest his feet on this 12 inch space. In this very narrow place it was also necessary for Bailey to turn a nut using a heavy 3 foot wrench, thereby setting in motion a fast revolving shaft. That was the only method by which the hopper of the car could be opened to allow the cinders to be dumped through the bridge. Once the shaft started to spin, it was necessary for Bailey to act quickly, to disengage the wrench or let go of it, lest he be thrown off his balance and knocked from the bridge. The car could have been unloaded on the solid ground at one end of the bridge where Bailey would have had adequate footing to carry out the operation of unloading the car. With the car spotted on the deck of the bridge, the job was recognized by the foreman as a dangerous undertaking for he warned Bailey "to be careful the wrench doesn't catch you." While in this precarious position, the expected happened, and Bailey was thrown from the bridge.

In the case brought here for review the bridge and building crew of 5 men, including Bimberg, the decedent, was

assigned the job of lining or straightening the running track on the wood trestle bridge at Iron River, Wisconsin. Four of the men were equipped with lining bars and they took positions in the form of a square on the top deck of the bridge for the purpose of wedging the running track ½ inch to the south. Two men were assigned to each rail. Bimberg was standing in the center of the bridge facing his partner with his lining bar under the south rail. Having inserted their lining bars under the rails, the four men, at an appropriate signal, heaved in unison on their bars. Three or four such operations resulted in wedging the deck of the bridge toward the south about ¼ of an inch. On the next operation, Bimberg's bar apparently slipped, he lost his balance and pitched over the south side of the bridge into the ravine below. The top deck of the bridge was in a good state of repair and there was nothing wrong or defective with the lining bar. Bimberg was an active, able-bodied bridge and building man and he was familiar with track lining work.

It is said in the opinion of the Supreme Court of Minnesota that: "The Bailey case is strikingly similar in its facts to the instant case." The *Hanson* case, *supra*, upon which we rely, is not mentioned or referred to in the opinion in any manner whatsoever. In order that we may more intellingently draw a comparison as to the similarity or dissimilarity of the three cases cited, let us consider some of the features involved in each case.

Bailey was a section man and as such was unfamiliar with bridge and building work. The bridge upon which Bailey was required to go was occupied by a railroad car which took up all of the space of the bridge except 12 inches along the siding. Bailey was unskilled in the work assigned to him; no one had ever seen him do that work before. The unloading of the car of cinders could have been done with

safety on the ground at one end of the bridge. The work Bailey was performing was recognized by his foreman as dangerous, hazardous and likely to cause injury. Bailey's place of employment was new and strange to him as were the tools furnished him with which to carry on his work.

Bimberg was a bridge and building man and had worked on a similar type trestle both on the top deck and substructure for a period of several months. The bridge upon which Bimberg was working was not occupied by any railroad equipment at the time of the accident. Bimberg was experienced and had done track lining work before. The work that the men were doing, that of lining the track, had to be done on the top deck of the bridge. No one in Bimberg's crew recognized the job of lining track as dangerous, extra hazardous or likely to cause anyone injury. Bimberg was in his usual place of employment, handling tools with which he was familiar.

Hanson was a bridge and building man of experience. The bridge upon which Hanson was working was not occupied by railroad equipment. Hanson had done all types of bridge work and had been engaged in this particular work two or three days. The job of chipping away rock had to be done on the bridge floor. The men engaged in this work apparently did not consider it dangerous or hazardous. Hanson was in his usual place of employment, handling tools with which he was familiar.

This Court took into consideration the facts in the *Bailey* case, as outlined herein, and in holding that the negligence of the defendant was for the jury it said:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge

on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. * * *"

It is submitted that there is no similarity between the facts in the *Bimberg* case and the facts in the *Bailey* case, but that there is a striking similarity between the facts in the *Bimberg* case and the facts in the *Hanson* case. Therefore, since the Supreme Court of Minnesota did not distinguish, modify or overrule the *Hanson* case, it should have rendered its decision in the *Bimberg* case in accordance with the principles of law laid down by that Court in the *Hanson* case.

2. *Error in holding that construction of wood trestle bridges presents a jury question even though there is no dispute as to general custom and practice with regard to construction thereof.*

The language used by the Supreme Court of Minnesota in its decision, in our opinion, stamps the wood trestle bridge of petitioner as a place which is inherently dangerous and as such must be recognized by petitioner at all times as a place where harm is likely to occur.

There are men who cannot walk across a high wood trestle bridge right along the center thereof, without becoming dizzy because of the height from the ground. On the other hand there are men who can walk across a high wood trestle bridge on one of the guardrails at the very edge thereof and never be affected in the slightest particular from the height at which he is from the ground. There-

fore, recognizing the foregoing as true, one could always find different minds reasonably arriving at different conclusions and in reasonable disagreement as to the inferences to be drawn from the fact that a wood trestle bridge is or is not a dangerous place on which to work.

As we view the language of the Supreme Court of Minnesota, even with all the safeguards mentioned by the Court, the question of negligence would still be for the jury as to the work done on the top deck of a wood trestle bridge, because different minds will always disagree as to whether or not it is a safe place on which to work.

Some of the language used by the Supreme Court of Minnesota was as follows: "The issue of negligence was one of fact, and this, though there may have been no dispute as to general custom and practice, etc.". General custom and practice as applied to the construction of wood trestle bridges is built up through years and years of experiment, trial and error, and the exchanging of ideas. It represents the sum total of practical railroad engineering construction, and when there is no dispute among the railroads on that point, and no showing by respondent that the general custom and practice adopted by the railroads is bad, it should be accepted by the Court as good railroad practice and not subject to review by a jury every time an accident occurs. If the petitioner cannot rely on general custom and practice, as adopted by the six or seven major railroads operating out of Duluth and Superior, then it is without any assurance in law that its property rights will be safeguarded; and it will always be subject to the vagaries of a jury or the vague and untried theories of some doctrinaire who conjures various theories upon which negligence might be predicated in any given case, after an accident occurs.

3. *Error in holding that it was negligence not to furnish bridge and building carpenters working on top deck of wood trestle bridge with either temporary or permanent guardrails, longer ties with closer spacing, or safety belts, without proof that these would have prevented accident or were in general use elsewhere on other railroads.*

It is difficult to see how petitioner could have anticipated injury to one of its bridge carpenters from failing to furnish guardrails or safety belts while working on a wood trestle bridge. This is particularly true when these bridge carpenters are continually working day after day on all portions of these bridges, from the ground up to the top deck, and are as familiar with the situs of their employment as a section man is familiar with the track built upon the solid ground; or as familiar as a trainman with the box cars and locomotives upon which he performs his daily employment.

It should be remembered that these bridge and building men are working with the installation of ties on the top deck of the wood trestle bridge as much as any other portion of the bridge. To say that the failure to lay ties slightly closer together is a cause of negligence, to be considered in connection with lining track, bears much resemblance to a situation where one looks for an excuse for fastening liability rather than a reason therefor. There is no evidence in the record that such failure was in any way connected with the accident as a cause thereof.

Bimberg's position on the top deck of the bridge placed him approximately in the middle of the track and 5 feet from either edge of the bridge. Certainly the dictates of reasonable care would not apprise anyone of ordinary prudence, that he must anticipate that the absence of railings or safety belts would bring harm of any kind to anyone in that position. The evidence disclosed that Bimberg had

his feet 2 or 3 feet apart, and in that position he was braced for any ordinary slip of the bar or loss of balance. There is nothing in the record to indicate just what he did do, but it is quite evident from the facts and circumstances surrounding the accident that he did something unusual and out of the ordinary; otherwise he would not have pitched so rapidly off the south side of the bridge. To require railings or belts to guard against an accident so remotely possible as that which occurred here, is fastening upon the defendant a degree of care higher than the degree of care required of an ordinarily prudent person.

Here it conclusively appears that all railroads in this area have adopted and put into common use this type of wood trestle bridge. Those engaged in that kind of enterprise have found that it meets their needs and requirements. Therefore no one can say with any degree of assurance that petitioner failed to exercise reasonable care and foresight for the safety of its bridge carpenters.

The Supreme Court of Minnesota pointed out that:

> "More regard for the safety of its employees and less for the item of incidental expense might have suggested to the railroad company either temporary or permanent guardrails, longer ties with closer spacing, or safety belts to prevent just such an accident as here described."

Petitioner has always considered the item of safety in connection with the construction of its line of railway and the construction of wood trestle bridges. In fact, this very track lining operation was dictated by the principles of safety to the rolling stock of petitioner, and the public generally. A running track which is out of line a half inch on a wood trestle bridge might prove hazardous and thereby cause damage and injury to merchandise and passengers carried by the trains of petitioner.

Guardrails and catwalks, such as described and recommended by John Wilson, the expert whose testimony was introduced in evidence by respondent, would have made the top deck of petitioner's bridge top heavy, and it would have been a very susceptible target for even an ordinary wind. Not long ago in our newspapers, we read of a top-heavy bridge over the Mississippi river in the State of Illinois having been blown into the river by an ordinary wind because of the fact that there was too much superstructure. Such construction on the top deck of the wood trestle bridge of petitioner would have introduced a hazard which the Supreme Court of Minnesota or this Court would have promptly condemned.

The installation of railroad ties 4 inches apart is a practice dictated by the weight of the load of trains to be operated over the bridge, and as long as the ties are evenly spaced the difference of 2 or 3 inches in width could not possibly have affected the footing of the bridge and building carpenter in this case. There is no evidence in the record that Bimberg had any difficulty with his footing or that the width of the ties or the space between the ties contributed in any manner whatsoever to his injury and death.

Safety belts are used by window washers and structural steel workers who perform their work on steel skeleton skyscrapers high above the ground with nothing underneath them but the girder on which they are working. Safety belts are not practical on the top deck of a wood trestle bridge for various reasons, some of which are: with several men working in a close square they are apt to trip over the ropes, thereby creating a greater hazard than if the safety belt were not present; bridge and building men must clear the top deck of the bridge upon the approach of a train, and the use of more or less fixed equipment like safety belts, which have to be securely fastened to some portion of the top deck of the bridge, creates an-

other hazard that might result in harm to the workmen. As the evidence shows, safety belts have never been used by any railroad in Minnesota and Wisconsin in connection with the work of bridge and building carpenters on the top deck of wood trestle bridges.

4. *Error in ignoring the fact that respondent did not prove actionable negligence against petitioner under the Federal Employers' Liability Act.*

To prevail in her action the respondent was required to plead and prove negligence on the part of petitioner as a proximate cause of the death of decedent. Under the provisions of the Federal Employers' Liability Act, unless petitioner was guilty of actionable negligence, liability cannot be fastened upon it for the death of decedent. That principle is enunciated in the case of *Tennant* v. *Peoria & Pekin Union Railway Co.*, a recent United States Supreme Court decision found in 88 L. Ed. 322, wherein the Court held that upon plaintiff rested the duty of proof that "defendant was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident"; and in addition she "was required to present probative facts from which the negligence and the causal relations could reasonably be inferred".

Respectfully submitted.

NORTHERN PACIFIC RAILWAY CO.,
By W. O. BISSONETT,
L. B. DAPONTE,
FREDERIC D. MCCARTY,
Counsel for Petitioner.

Dated, August 25th, 1944.

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(34)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 396

NORTHERN PACIFIC RAILWAY COMPANY,
Petitioner.

vs.

KREEDA BIMBERG, SPECIAL ADMINISTRATRIX OF THE ESTATE OF CLIFFORD BIMBERG.

OBJECTIONS TO AND ARGUMENTS AGAINST PETITION FOR WRIT OF CERTIORARI.

HENRY PAULL,
I. K. LEWIS,
Counsel for Respondent.

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STATEMENT OF FACTS SUPPLEMENTARY OR CONTRADICTORY TO APPELLANT'S STATEMENT OF FACTS

The wood stringers, called guard timbers, near the outer edge on each side of the bridge, extended only 5½ to 6 inches above the tops of the ties.

> "The ties were nominally 8-inch ties, but actually, they were about 7½ inches wide; their centers were spaced 14 or 15 inches apart, leaving an open space of from 6 to 8 inches between them." (Quoted from Minnesota Supreme Court.)

The average spacing between the ties was 7 inches (ff. 96 and 1289).*

The job on the deck of the bridge was to be about a 3½-hour job.

Where Clifford Bimberg was working, the lowest angle from which his bar could start was 43½ degrees, because it had to be inserted between the inner guard rail and the running rail. (f. 601 and ff. 774 and 775). The tendency of the bar to slip comes on reaching the 45 degree angle, (f. 767) and a heave calls for a 5 degree lift. (f. 132 and f. 983).

*—Folio references are to the record used in the Minnesota Supreme Court.

The proper angle of the lining bar against the rail at the beginning of the heave is 30 to 35 degrees, (f. 132 and f. 983) and at the end of the heave, between 35 to 40 degrees. (f. 984) Kuru, an inexperienced man, (f. 230) testified he started at an angle of 20 degrees and heaved up to an angle of 40 to 45 degrees. (f. 248).

This was not a proper way to heave (f. 986) and had the effect of jarring Bimberg and releasing his bar. (f. 613 and f. 776).

There were no guards on the bridge so that once Clifford Bimberg lost his balance, there was nothing to stop his fall. (f. 124).

* * * *

Appellant states the Minnesota Supreme Court decision was not in accordance with the applicable decisions of this court, but immediately thereafter, on page 5, assigns as error the fact that the State Court "based its decision upon the case of *Bailey v. Central Vermont Ry. Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed 1444, which case is not in point."

In appellant's petition for writ of certiorari are stated four reasons relied on for allowance of the writ. In the brief in support of the petition appear four specifications of errors, which correspond in substance to the reasons specified in the petition. These will be discussed in the same order in which appellant presented them.

I.

The Minnesota Supreme Court did not overlook or ignore the case of *Hanson v. Great Northern Railway Co.*, 128 Minn. 122, 150 N. W. 380, affirmed in a per curiam decision in 1916, 242 U. S. 615, 37 S. Ct. 211. Attorney for appellant called the court's attention to this case in a letter to the court, and the case is specifically referred to in the dissenting opinion of Justitce Olson. Appellant again called special attention to the Hanson case in his application to the court for reargument.

In disposing of appellant's petition for re-argument, the court first discussed a presumption of law which the trial court gave in his charge and which is immaterial here, and then the court stated:

> "The other questions raised were fully disposed of in the original opinion."

The Hanson case was not followed by the Minnesota Supreme Court because it is not in point.

We offer a brief statement about the Hanson case. The Minnesota Supreme Court in that case reversed the trial court; in our case they affirmed.

In the Hanson case the accident happened in the winter time. Plaintiff was working on a bridge parapet 13 feet above ground on a space shaped like a triangle, 2 feet wide, 4 feet long and tapered back to a few inches. The only negligence charged was that the defendant failed to furnish plaintiff with a safe place to work. The only claim made of dereliction by defendant was that the work space should have been covered with a wooden floor or platform so as to cover a so-called casting and certain projecting nuts and bolts. There was not established in the case that the platform would have made the place any safer and the court felt that covering the bolts and caster would have increased the danger for winter work as the protruding nuts and bolts constituted foot rests and supports. There was no claim nor proof that any guards could have been used.

This case deals only with the question of reasonable care to furnish a safe place for work. On this point in the Bimberg case, there was proof that the spacing between the ties was below standard and that the footing was inadequate; that the bridge was only a temporary structure and should not have been operated so long; that the presence of an inner rail near the running rail made it necessary to work the bar at a dangerously high angle, thus adding to the danger of the work place; and that in the exercise of reasonable care, guards or other safety factors should have been furnished to make the place of work more safe.

In the Bimberg case there are grounds of negligence alleged and voluminous proof offered and presented in the

record, which are wholly absent from the Hanson case. They are:

1. Failure to furnish safeguards.

2. Failure to instruct and negligence of fellow employees.

3. The place of work being made more unsafe because decedent was required to work with his bar at an unusual and dangerous angle and this made the need of guards, rails or safety devices more necessary.

The Hanson case was finally decided in 1916. The case of *Bailey v. Vermont Ry*, 63 Sup. Ct. Rep. 1062; 319 U. S. 350 was decided May 24, 1943, and, we submit, is a more closely analogous case.

Bailey v. Central Vermont Ry., Inc., supra, relied on by the Minnesota Supreme Court is, as stated by that court, "strikingly similar." Although the Hanson case does not at all raise or discuss the question of a guard rail, the Bailey case does.

The Minnesota Supreme Court reviewed the facts and quoted the Bailey case as follows:

"The Bailey case is strikingly similar in its facts to the instant case. There a section man was unloading cinders from a hopper car by dumping them through the ties in a bridge floor onto a roadway beneath the bridge. In preparing to open the hopper, he walked out on the stringer of the bridge and applied a wrench to a nut at the end of a shaft running crossways of the car. The hopper opened, the nut spun, and Bailey was thrown by the wrench into the roadway 18 feet below. Disposing of the question whether there was sufficient evidence to go to the jury on the question of negligence in failing to furnish Bailey a safe place to do the work, the court said:

> 'The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required,

the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that ttype of issue (*Tiller v. Alantic Coast Line R. Co., supra* (318 U. S. 681), as well as issues involving controverted evidence. *Jones v. East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445; *Washington & Georgetown R. Co. v. McDade*, 135 U. S. 554, 572. To withdraw such a question from the jury is to usurp its functions.

'The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence'. *Jacob v. New York City*, 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.'

The Bailey case is decisive here so far as the propriety of submitting the issue of negligence is concerned."

Appellant's position in the Bimberg case is contrary to the Bailey case. Appellant argues that footing and guard rails are not proper questions for the jury. The Supreme Court in the Bailey case states that they are.

Even if the Minnesota Supreme Court had considered the Hanson case in point and intended to depart from it, that would not constitute a Federal question.

> "The mere fact that a state Supreme Court decides against a party's claim of property or contractural right by reversing its earlier decision of the law applicable to such cases does not deprive him of his property without duce process of law contrary to the 14th Amendment nor amount to passing of 'any law' impairing the obligation of contract. This has been so often adjudged by the Supreme Court that contentions to the contrary are without subsance." (*Tidal Oil Co. v. Flanegan*, 263 U. S. 444.)

II.

Appellant charges it is required to be an insurer under the language used by the Minnesota Supreme Court "pertaining to the right of a jury to pass upon questions of liability, * * *."

For one to be an insurer, one is liable for damages, regardless of negligence. In our case, the court's decision holds that there is no liability unless negligence is first found.

> "The issue of negligence was one of fact * * *."

The Minnesota Court followed the views of this court as expressed in the Bailey case (supra) as to the province of the jury.

Appellant assigns error in the court's holding that construction of wood trestle bridges presents a jury question

even though there is no dispute as to general custom and practice with regard to construction thereof.

With reference to this contention of appellant, the Minnesota Supreme Court stated:

"Anticipating such defense, the plaintiff, in addition to detailed explanation by oral and photographic testimony as to the construction of the bridge here involved, offered expert testimony that according to good engineering practice the open space between ties on bridges should not exceed 4 inches, so as to provide a better floor; that 12-foot ties are safer and more standard than 10-foot ties; and that either a temporary or permanent railing should be provided to protect workmen from falling off a bridge of this character. Plaintiff's experts were of the opinion that accidents of the type here involved could largely, if not wholly, be avoided by erecting guardrails, by spacing the ties closer, and by providing the bridge crews with safety belts."

"* * * But, as the authorities we shall cite establish, there is, in fact, no distinction in the tests applied by the federal courts and those uniformly applied by this court in cases arising under our own laws."

"Local usage and general custom, either singly or in combination, will not justify or excuse negligence. They are merely foxholes in one of the battlefields of law, providing shelter but not complete protection against charges of negligence. The generality of its plan of construction for trestles or bridges cannot excuse a railroad company from responsibility for negligence in its construction. Such plan of construction, commonly followed and 'fortified,' as defendant insists, 'by many years of successful railroad operation,' may be evidence of due care, but it cannot avail to establish as safe in law that which is dangerous in fact. 38 Am. Jur., Negligence, Sec. 33; *Minneapolis S. & D. Co. v. Metropolitan Bank*, 76 Minn. 136, 78 N. M. 980, 44 L. R. A. 504, 77 A. S. R. 609; *Anderson v. Fielding*, 92 Minn. 42, 99 N. W. 357; *Witta v. Interstate Iron Co.*, 103 Minn. 303, 115 N. W. 169, 16 L. R. A. (N. S.) 128; *Rickerd v. C. St. P. M. & O. Ry. Co.*,

(8 Cir.) 141 F. 905, 73 C. C. A. 139; *Texas & P. Ry. Co. v. Behymer*, 189 U. S. 468, 23 S. Ct. 622, 47 L. ed. 905; *Wabash Ry. Co. v. McDanields*, 107 U. S. 454, 2 S. Ct. 932, 27 L. ed. 605; *C. M. & St. P. Ry. Co. v. Moore* (8 Cir.) 166 F. 663, 92 C. C. A. 357; *Midland Valley R. Co. v. Bell* (8 Cir.) 242 F. 803, 155 C. C. A. 391; *C. G. W. Ry. Co. v. McDonough* (8 Cir.) 161 F. 657, 88 C. C. A. 517; 2 Roberts, Federal Liabilities of Carriers (2 ed.), Sec. 809."

"The contrary doctrine is traceable in many decisions to the common-law rule that the servant assume sthe ordinary risks of his work or those usual to his employment. 35 Am. Jur., Master and Servant, Sec. 124; Note, 68 A. L. R. 1416. Such decisions may now be entirely disregarded, for 'every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment' to F. E. L. A. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 58, 63 S. Ct. 444, 446, 87 L. ed. 610, 612. Even before the amendment, the United States Supreme Court, in a case to which the present appellant was a party, had declared that 'Ordinary care * * * is not merely such care as other railroad companies exercise under like circumstances, for other railroad companies may be careless.' *Northern Pacific R. Co. v. Mares*, 123 U. S. 710, 719, 8 S. Ct. 321, 326, 31 L. ed. 296, 301."

Appellant's position that the railroads, by their custom and usage, should determine due care instead of the juries, is contrary to the decisions of this court and of the rule followed in Minnesota and contrary to the majority of states in the United States.

III.

There was proof that the various safeguards mentioned could "largely if not wholly" protect against such accidents as involved in this case. In reviewing the testimony on this point, the Minnesota Supreme Court stated:

> "Plaintiff's experts were of the opinion that accidents of the type here involved could largely, if not wholly,

be avoided by erecting guard rails, by spacing the ties closer and by providing the bridge crews with safety belts."

Some of the evidence from the record supporting the court's statement of the facts is as follows:

Richard Thomas testified that safety lines are used to prevent a man from falling, (f. 246) and that temporary guard rails serve the same purpose; (f. 427, 428, 431, 432) and John Wilson also testified that there should be at least a temporary guard rail to protect the men from falling, (f. 586) and that it is recommended by the United States Department of Labor (ff. 1369 to 1371). Mr. Wilson also testified that the footing of the bridge was insufficient and gave an insecure balance; (ff. 754 to 777) that footing is important for doing track work on trestles. (ff. 527, 528.)

The case of *Zinnell v. U. S. Shipping Boat Emergency Freight Corp.*, 10 Fed. (2d) 47, is in point.

Decedent was washed overboard when the vessel he worked on "shipped asea," Negligence charged was failure to have a rope strung along the deck which corresponds closely to the negligent failure to have a temporary guard rail in our case. A writ of error was brought by the Plaintiff on the Defendant's obtaining a dismissal of the complaint. It was held:

> "Nor can we see how * * * there can be much doubt about the necessity of some such guard. The deck load, in effect, raised the well deck to the level of the forecastlehead, and left no protection of any sort. Without some guard rail we need no expert to show us that a case was presented which a jury must decide as to the safety of the place where the intestate was ordered to work. Indeed, it seems to us hard to see how a jury could find for the Defendant on the issue, as well as on the issue of the absence of the line."

Appellant's further point that it was necessary to prove that the safeguards were in general use on other railroads raises the same question posed under the second assigned error. Appellant's claim that custom is controlling is contrary to law.

IV.

The Minnesota Supreme Court has not "overlooked or ignored" the need of proving actionable negligence. Our Supreme Court is of high caliber. It isn't very likely they would "overlook or ignore" the substance of a case and chase shadows.

The record is replete with evidence of actionable negligence on the part of the railroad. We quoted some of this testimony above. We herewith refer to more:

Edward G. Johnson, bridge and building supervisor for the defendant railroad, testified the average spacing between the ties on the Iron River trestle was 7 inches and might go to 7½ inches. (f. 1289); that the Duluth, Winnipeg and Pacific centers their ties on trestles at 12 inches while the Northern Pacific centers them at 15 inches. (ff. 1290 to 1293.)

Oscar A. Gran testified that a bridge with spaces of 7 to 8 inches between the ties fails to conform even to the standards of the Northern Pacific. (ff. 1190, 1191.)

With reference to the floor of the bridge, he (John Wilson) testified that the spacing between the ties permitted a man's foot to go in between the ties and make him fall (f. 529, f. 437, f. 754); that footing is important for doing track

work on trestles; (ff. 527, 528) that in standing on one tie, his toes or heels as well are projecting over the tie giving him insecure balance; (ff. 754) that the anchoring of every fourth tie usually made it necessary for track men to stand on a moving tie; that even slight movement does affect footing and tend to release things a little even though the movement is imperceptible. (ff. 582 and 777.)

Mr. Wilson testified that from an engineering standpoint, it is necessary to consider the safety of these workers as well as the safety for the train (ff. 700, 701); that the use of permanent railings on trestle bridges is standard construction and called attention to the D. M. & I. R. bridge over the Lester River. (f. 786.)

He testified that bridge work was too hazardous for ordinary workers; (f. 747) * * *

Mr. Wilson testified that the deck of this bridge was not a safe place to work (ff. 583, 584;) that a person is just as liable to fall from a wooden bridge as from a steel bridge; that the need for a cat-walk or railing would be the same for both types. (f. 787.)

Where Clifford Bimberg was working, the lowest angle from which his bar could start was 43½ degrees, because it had to be inserted between the inner guard rail and the running rail. (f. 601 and ff. 774 and 775.) The tendency of the bar to slip comes on reaching the 45 degree angle, (f. 767) and a heave calls for a 5 degree lift. (f. 132 and ff. 983.)

Richard Thomas testified that in working on steel bridges the men are generally required to wear a belt with a safety line on it to guard against falling, (ff. 425 to 428, incl.) and that a temporary guard rail is also used to guard against falls to the ground. (ff. 431, 432.) (See also other testimony quoted in other parts of this brief. Much additional voluminous testimony appears in the record.)

GENERAL DISCCUSION

Attorney for appellant defends the testimony of his witnesses as the only true "religion." The fact remains that his witnesses are contradicted by reliable witnesses for the plaintiff. This presents a question of fact for the jury.

As to custom and usage, there is evidence the bridge in question did not conform to recognized standards. One of the railroads relied on by appellant centers its ties at 12 inches as compared with 15 inches of the Northern Pacific. (ff. 1290 to 1293.)

Appellant states that decedent must have done something wrong to lose his balance. The evidence is to the contrary —that he did his work properly. (ff. 135, 949, 950 and 1046.)

On the other hand there is ample evidence that there were factors for which the deceased was not responsible that brought on the accident—the high angle from which he had to heave; (see photograph referred to in f. 599) the poor footing; the wrong heaving of Floyd Kuru, an inexperienced man, and the jar resulting to Bimberg. (ff. 611 to 613.)

Appellant states it is unreasonable to anticipate any of these men were exposed to danger.

At the place where the accident occurred, the deck of the bridge was between 38 and 40 feet from the ground. The center of the bridge was as much as 60 feet from the ground. The bridge at its widest was only 12 feet, and where the accident happened, was only 10 feet wide and decedent was working 5 feet from the edge. It is quite obvious that any sort of a mis-step, loss of one's balance, would be a very serious matter on this bridge. The danger of a mis-step or losing one's balance is always present in working on such a bridge. It is just as imminent as is the similar danger to the workers who work on steel bridges, and whose union and industry rules require that they be furnished either with safety belts or temporary guard rails or other similar safeguards. As was testified to by John Wilson and quoted in our statement of facts, a man is likely to be just as dead if he falls from a wooden bridge as he would be if he falls from a steel bridge. A mis-step or the loss of one's balance on this bridge is something that could readily happen. It was not a simple case of the men just walking across this bridge. The job called for about 3½ hours work as was testified to. Each of these men was working with a long, iron bar weighing 28 pounds. As Mr. Thomas testified, his workers sometimes find themselves thrown off balance by a wrench slipping, by accidentally bumping into some minor obstruction. Workers often lose their balance and stumble and fall even working on the ground. Here the men were required to work where the footing was at best, unstable and irregular. A crew of four men was working together on a narrow 10-foot width of bridge. Men easily bump into each other under such circumstances. A 28-pound bar slipping can easily throw a man off balance. Once a man loses his balance, as was testified by the witnesses, there was nothing to stop him from taking the fatal plunge.

Appellant states that safety belts are used by structural steel workers only when they work on high girders. However, these men use safety belts also when they are working on the decks of bridges. (ff. 417 to 428, incl.)

The testimony of plaintiff's witnesses disputes appellant's claims that safety belts or guard rails are impractical. (f. 786.)

A temporary guard rail "can be set up in a few seconds and be removed just as quickly and is recommended by the U. S. Department of Labor." (ff. 1369 to 1371.)

The safety belts are quickly attached and detached. (f. 430) These men are informed in advance of what trains may be expected and have ample time to avoid trains.

Appellant takes exception to the Minnesota Supreme Court cautioning:

> "More regard for the safety of its employes and less for the item of incidental expense might have suggested to the railroad company either temporary or permanent guardrails, longer ties with closer spacing or safety belts to prevent just such an accident as here described."

The reference to the expense was probably prompted by the following testimony of one of the engineers who testified for the appellant as follows:

> "Q. 'So, in other words, it is a question of expense, as far as you are concerned?'
>
> A. 'Question of economics.'
>
> Q. 'Don't you consider the safety of passengers passing over the bridges and safety of men working on the bridges; don't those enter into your calculations at all?'
>
> A. 'I don't know.' (f. 1219.)"

Appellant has raised issues only on disputed facts or on propositions of law about which it is mistaken. These will not justify granting certiorari.

The contention that the absence of guard rails and the footing on the bridge are not evidence of negligence has already been determined by this court in the Bailey case (supra.) The Bimberg decision is in accord with the applicable decisions of this court, as represented by the Bailey case. (Rule 38, 28 U. S. C. A., Sec. 354.)

> "A Federal question may have been so explicitly foreclosed by prior decisions as to afford no basis for a writ of error."
>
> *Equitable Life Assurance Society v. Brown*, 187 U. S. 308.

That the Supreme Court in an action at law at least has no jurisdiction to review the decision of the highest court of a state upon a pure question of fact, although a federal question would or would not be presented, according to the way in which the question of fact was decided, is clearly settled by the following authorities:

> *Lewis v. Campan*, 3 Wall. 106, 18 L. Ed. 211.
> *Backus v. Fort St. Union Depot Co.*, 169 U. S. 557, 42 L. Ed. 853.
>
> *King v. West Va.*, 216 U. S. 92, 54 L. Ed. 396.
>
> "It is not the province of this court to weigh conflicting testimony. The record shows testimony supporting the verdict and that as far as this court enters upon a consideration of that question."
>
> See: *Gt. No. Ry. Co. v. Donaldson*, 246 U. S. 121, 62 L. Ed. 616.

(Affirming a judgment for plaintiff in an action on the Federal Employers Liability Act.)

Petitioner respectfully asks that certiorari be denied.

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